No. 90-472

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL FABRICATORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by selecting seven employees for layoff because it believed they would honor an anticipated union picket line at petitioner's plant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 903 F.2d 396. The Board's decision and order (Pet. App. B1-B5, C1-C8) are reported at 295 N.L.R.B. No. 126.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on June 19, 1990. The petition for a writ of certiorari was filed on September 14, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a nonunion fabricator of pipes. Some of petitioner's employees were members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 198 (Union). Pet. App. C1-C2.

On December 15, 1986, the Union sent a letter to its members permitting them to work for nonunion employers provided they signed an undertaking to help organize those employers. On September 15, 1987, however, the Union's International sent the members a letter stating that the December 1986 authorization of employment by nonunion employers was in error; the Union's constitution prohibited such employment. The letter stated that members had 30 days in which to surrender such employment or face exposure to union discipline. Pet. App. A2, C2.

In view of the International's threatened action within 30 days, petitioner's employees and supervisors anticipated that the Union would begin to picket petitioner's plant by October 15, 1987; this possibility occasioned discussions concerning whether the Union employees would honor a Union picket line. In late September or early October 1987, the Union in fact determined that petitioner would be targeted as an employer subject to an organizing campaign. As part of that effort, seven of petitioner's employees, who were already Union members, signed Union authorization cards between September 28 and October 2, 1987. Pet. App. A2, C2.

On October 7, 1987, petitioner faced a downturn in work and laid off some of its work force for economic

reasons. Pet. App. A1-A2, C3.[1] Petitioner's co-owner, Oscar LaFleur, selected for layoff the seven Union members who had signed authorization cards, even though there were less senior nonunion employees. LaFleur explained that the Union employees were chosen because of the fear that they would honor the anticipated Union picket line. Pet. App. A5, B2, C3.

No picketing took place at petitioner's premises on or after October 15. Within three weeks after the layoff, all seven employees had been recalled to work. Pet. App. A3, A6 & n.2.

2. Upon charges filed by the Union, the Board, affirming the administrative law judge's ruling, found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1),[2] by "select-[ing] seven employees for a temporary economic layoff on the ground that they were likely to honor a union picket line that might be set up at [petitioner's] establishment in the near future." Pet. App. B2. Applying principles articulated in *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 703 (1983), the Board concluded that the selection of the seven employees

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[1] The initial reference to the layoff date as October 17 in the ALJ's decision (Pet. App. C2) is a typographical error. See Tr. 244-245.

[2] Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title". As this Court has noted, "a violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1)." *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 698 n.4 (1983).

on that ground was inherently destructive of their statutory rights, and that petitioner had "offer[ed] no compelling reason" for its utilization of this "discriminatory criterion." Pet. App. B4.

The Board explained that selecting employees for layoff based on their propensity to honor a picket line "is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity" because it leaves employees who wish to safeguard their jobs with little choice "but to agree in advance to resist the Union's probable appeal to engage" in concerted activity. Pet. App. B2-B3. The Board added that "[s]uch direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hindrance to future organizational activity." Pet. App. B3.

The Board then turned to petitioner's asserted business justification for its invasion of employee rights, and found that it was "neither legitimate nor substantial." Pet. App. B4. The Board found no evidence that "the continued operation of [petitioner's] business necessitated that it utilize a discriminatory criterion for laying off employees." *Ibid.* Rather, the Board noted, if the discriminatees had honored a picket line, "the employer remained free to hire replacements or call back to work those who had been laid off under a neutral standard." *Ibid.*[3]

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[3] The Board rejected petitioner's effort to transpose the policy justifications underlying *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (an employer may hire temporary or permanent replacements for striking workers), to the situation here involving an employer's discriminatory layoff of employees believed likely to honor a future picket line. Likewise, the Board rejected petitioner's reliance on *NLRB* v. *Brown Food Store*, 380 U.S. 278 (1965), which upheld an employer's right to lock out employees in advance of a strike

3. The court of appeals enforced the Board's order, concluding that the Board's decision was "reasonable and supported by substantial evidence from the record." Pet. App. A1. The court noted that, "[i]f an employer's discriminatory conduct is 'inherently destructive' " of important employee rights, "it carries with it a strong inference of impermissible motive, and no proof of antiunion animus is required." *Id.* at A4, citing *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The court accepted the Board's conclusion that petitioner's "decision to lay off those employees who were expected to honor a picket line was inherently destructive of important employee rights." *Ibid.* It stated that "[p]eaceful picketing and honoring of a picket line fall within the activities protected by section 7 and selecting for layoff those employees who are expected to engage in those protected activities undoubtedly discourages such activity." *Id.* at A5 (citations omitted). The court agreed with the Board that, "[t]o avoid being laid off, union employees were left with little choice but to agree in advance to resist the union's probable appeal to engage in picketing," and that "[s]uch direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hindrance to future organizational activity." *Ibid.*

The court rejected petitioner's contention that its conduct was not "inherently destructive because the

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and to carry on operations with temporary replacements. The Board noted that the lockout in that case affected all of the employees, "not just those most likely to support the union," and that the employer there had the legitimate business objective of "defending the integrity of the multiemployer bargaining association in the face of a whipsaw strike." Pet. App. B3.

seven employees were rehired within three weeks," noting that the "short" duration of the layoff was "fortuitous, as the layoff was indefinite and could have lasted much longer." Pet. App. A5-A6. The court also dismissed petitioner's argument that its conduct could not have been destructive of employee rights because it has, since the layoff, hired additional union employees. Citing *Metropolitan Edison*, 460 U.S. at 703, the court stated that the crucial inquiry is whether "the employer's conduct adversely affected protected employee rights," not whether "labor activity was actually hindered." *Id.* at A6. Finally, the court agreed with the Board that petitioner had failed to offer a legitimate and substantial business justification for selecting for economic layoff those employees expected to honor a picket line. *Ibid.*

ARGUMENT

The decision of the court of appeals correctly applies settled principles to the particular facts, and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. In *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), this Court explained the basic principles governing proof of an employer's antiunion motivation in a charge of unlawful discrimination under Section 8(a)(3). When an employer's discriminatory action is "inherently destructive of employee interests" protected by the Act, there is no need for direct evidence of antiunion animus to prove the unlawful nature of the employer's action; the conduct itself "carries with it a strong inference of impermissible motive." *Id.* at 701, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Given such conduct, "even if an employer comes forward

with a nondiscriminatory explanation for its actions, the Board 'may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Ibid.*[4]

Petitioner does not dispute these principles. Rather, espousing a version of the facts rejected by the Board and the court of appeals, petitioner asserts that its conduct was not "inherently destructive" of employee rights protected by the Act because it simply chose for layoff "those men who already expressed their intent to quit their jobs." Pet. 3, 7.[5]

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[4] Alternatively, if the Board concludes that the discriminatory conduct has only a "comparatively slight" impact on protected rights, a different analysis applies. In that situation, when the employer comes forward with a legitimate and substantial business justification for its conduct, an "anti-union motivation must be proved" in order to find an unfair labor practice. *Metropolitan Edison*, 460 U.S. at 701; *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34. Although petitioner apparently contends that it would prevail under this category of analysis (Pet. 4), the record does not support that claim. See p. 10, n.9, *infra*.

[5] Petitioner suggests (Pet. 4) that the Board did not conclude that petitioner's conduct was "inherently destructive," and that the court of appeals drew that conclusion "*for the first time.*" Pet. 2-3 (emphasis in original). That is incorrect. Not only did the Board describe petitioner's conduct as "coercive discrimination that naturally tends to discourage unionization and other concerted activity," it expressly cited *Metropolitan Edison* for the proposition that "finding that an employer's conduct is inherently destructive does not end the inquiry, but requires the Board to then 'strike the proper balance between the asserted business justifications and the invasion of employee rights.'" Pet. App. B2-B3. The Board's application of that aspect of the *Metropolitan Edison* formula-

According to petitioner, it was merely avoiding the inconvenience and inequity of laying off employees who intended to remain with it, rather than laying off those who planned to quit in a matter of weeks. But the Board, upheld by the court below, found that petitioner selected the seven discriminatees because of its fear that they would honor the anticipated union picket line, not because they were expected to quit their jobs.[6] That crucial finding underpins the Board's determination that petitioner's conduct was "inherently destructive." Pet. App. A4, B2-B3.

There is a significant difference between petitioner's proffered justification and the credited facts. While employees have no statutory right to work for an employer until they choose to quit their jobs, they do have a protected right to engage in concerted activity to attempt to unionize their employer. Petitioner directly penalized that right by selecting for layoff those Union employees expected to honor the Union's picket line. Accordingly, contrary to petitioner's contention (Pet. 7), the credited facts of this case amply support the court of appeals' conclusion, in upholding the Board, that petitioner's conduct "'directly and unambiguously penalizes or deters protected activity,'" Pet. App. A4, quoting *NLRB* v. *Haberman Construction Co.*, 641 F.2d 351, 359 (5th Cir. 1981).

Discrimination among employees based on whether they have participated in protected activity is inher-

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tion makes clear that the Board viewed petitioner's conduct to be "inherently destructive."

[6] Indeed, the ALJ specifically stated that "LaFleur illustrated through his entire testimony that he was referring to the likelihood that the alleged discriminatees would refuse to cross a picket line when he testified that they were going to quit." Pet. App. C8.

ently destructive of protected rights. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 231 (1963). Discrimination based on the employer's belief that the penalized employees *will* participate in protected activity is equally destructive of protected rights. *Commercial Contracting Co.*, 283 N.L.R.B. 784 (1987). Nor does the fact that petitioner called back the laid off employees within three weeks without any loss of seniority and subsequently hired union members (Pet. 4, 8) negate the chilling effect of its action on the willingness of employees to honor a union sponsored picket line in the future.[7] As the Board found, petitioner's decision to make layoff decisions on the basis of the employees' willingness to engage in protected activity "would surely pose a lingering hindrance to future organizational activity." Pet. App. B3. The finding that petitioner's discriminatory conduct is "inherently destructive" is a determination "entrusted * * * in the first instance to the Board," *Metropolitan Edison*, 460 U.S. at 702, and is entitled to "considerable deference." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

Contrary to petitioner's contention (Pet. 8), the court of appeals was correct in stating that the Board "need not demonstrate that the labor activity was actually hindered by the illegal employer activity." Pet. App. A6.[8] In *Metropolitan Edison*, the Court did not

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[7] Although recalled, the seven employees nonetheless lost three weeks of work and pay because of their perceived willingness to engage in protected activity. See Pet. App. C6 (backpay order).

[8] Petitioner misses the mark in asserting that *NLRB* v. *Sherwin-Williams Co.*, 714 F.2d 1095 (11th Cir. 1983), indicates that "a lasting effect on the exercise of protected activity" is required to classify a discriminatory practice as "inherently destructive." Pet. 8. In *Sherwin-Williams*, the court

require a showing that any employees had refused to serve as union officials before deferring to the Board's conclusion that the imposition of more severe discipline on striking union officials than on rank-and-file employees "adversely affects protected employee interests." 460 U.S. at 703. Here also, the Board was not required to demonstrate that petitioner's conduct had actually caused employees to refuse to participate in protected activity before finding such conduct inherently destructive of that right; instead, it could base that finding on a reasonable inference.[9]

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found that although an employer had an established practice of discontinuing disability benefits during work stoppages, the record did not show that "in the past this practice hindered future bargaining or created continuing obstacles," or that it had deterred the particular strike at issue. 714 F.2d at 1101. Here, by contrast, the record did not reveal a past practice by petitioner of choosing employees for layoff on any basis other than seniority. Pet. App. A2.

[9] Even if petitioner were correct in its assertion that its conduct was not "inherently destructive" of protected employee rights, but had only a "comparatively slight" effect on those rights (Pet. i), the Board's unfair labor practice finding would still be entitled to affirmance. As the Court explained in *Metropolitan Edison*, "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." 460 U.S. at 701, quoting *Great Dane*, 388 U.S. at 34 (emphasis in original). The Board and the court of appeals reasonably concluded that petitioner did not show "a legitimate and substantial" business justification for its conduct. Petitioner simply had no need to discriminate against employees expected to participate in a strike in order to protect its business interests, because it would be entitled to replace them with laid off employees or new hires should the expected picket line materialize and the seven employees honor it. Pet. App. A6, B4. In that setting, proof of anti-

3. Citing *Esmark, Inc.* v. *NLRB*, 887 F.2d 739 (7th Cir. 1989), petitioner suggests that conduct can be inherently destructive only if it interferes with an ongoing bargaining relationship. Pet. 5-6. That suggestion, however, is incorrect and draws no support from *Esmark* itself. In that case, in which there was an established collective bargaining relationship, the issue was whether the employer's conduct deterred the process of collective bargaining or just put pressure on employees to accept a particular substantive proposal. 887 F.2d at 748. But the court noted that

> [t]wo types of acts are considered "inherently destructive." First are actions which distinguish among workers based on their participation (or lack of participation) in a particular concerted action (such as a strike). On the other hand, conduct may be inherently destructive even though it does not divide the work force into antagonistic factions, but instead "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees."

Id. at 748-749 (footnotes omitted). The former type of action is involved here; the latter was involved in *Esmark*.

Petitioner's reliance (Pet. 9) on *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), is similarly misplaced. There, the employer locked out all of its unit employees in order to pressure them to accept the employer's bargaining proposals after the parties had bargained to impasse; no discrimination

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union animus was not required in order to find an unfair labor practice. See *Great Dane*, 388 U.S. at 34 (finding it "not necessary" to determine whether the employer's conduct was "inherently destructive" of employee rights, rather than having a "comparatively slight" effect on them, because "the company came forward with no evidence of legitimate motives for its discriminatory conduct").

against union members was involved. 380 U.S. at 308, 312. Here, by contrast, petitioner engaged in the *discriminatory* practice of subjecting to economic disadvantage only those of its employees whom it believed likely to engage in protected activity—honoring a picket line. The vice in petitioner's conduct inheres precisely in the discrimination among employees based on their anticipated willingness to engage in protected activity. See *Erie Resistor, supra*, 373 U.S. at 230-231. *American Ship* did not involve that practice. See *American Ship*, 380 U.S. at 312 ("There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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